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January 24, 2024

Mr. David J. Smith, Clerk of Court
U.S. Court of Appeals for the 11th Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re: *Kenneth Smith v. Comm'r, Ala. Dep't of Corrections, et al.*, No. 24-10095

Dear Mr. Smith:

On January 19, 2024, following oral argument in this appeal, Kenneth Smith filed a letter with this Court attaching a declaration from his attorney and a copy of an email between Smith's counsel and Appellees' trial counsel. Doc. 41.

On January 20, the Court construed the notice as a motion to supplement the record and denied it without prejudice, stating that Smith would be permitted "to refile his motion after he first seeks relief in the district court." Doc. 42-2 at 2.

Later that day, Smith filed a motion to supplement the record in the district court, which included his attorney's January 19 declaration, as well as a new attorney declaration from January 20. *See* DE72-1, 72-2. On January 22, Smith also moved to supplement the record with medical records. *See* DE80.

On January 22, the district court denied Smith's motion but issued an indicative ruling "that it would grant Smith's motion to supplement the record if the Eleventh Circuit remanded for that purpose." DE83:2.

On January 23, Smith moved for this Court to supplement the record or remand so that the district court could. Doc. 47. This time, Smith included the evidence described above, and a January 22 declaration from Dr. Robert Yong. Doc. 47 at 29-30.

Later on January 23, this Court noted that Smith “moved in the district court to supplement the record with Smith’s counsel’s affidavit about Smith’s new physical symptoms.” Doc. 51-1 at 2. The Court “grant[ed] Smith’s motion for limited remand to the district court for the limited purpose to entertain Smith’s motion to supplement the record.” *Id.* The Court “ask[ed] the district court to determine whether the new evidence would change the previous factual findings or conclusions of law in its January 10, 2024 order denying Smith’s request for a preliminary injunction,” and permitted the court to allow “the State to submit additional evidence in response to Smith’s new evidence.” *Id.* at 2-3.

The district court then allowed “both Smith and the Defendants” to “file motions to supplement the record, including an explanation of how to interpret the supplementary evidence.” DE85. Smith submitted the evidence described above, as well as a January 23, 2024 declaration from Dr. Katherine Porterfield. *See* DE87:1-2. Defendants submitted a declaration from Warden Terry Raybon explaining that Smith’s last meal will take place more than eight hours prior to the execution, and thereafter Smith will be allowed only clear liquids until two hours prior to the execution. *See* DE86:2, DE86-1.

In accordance with Federal Rule of Appellate Procedure 12.1(b), Appellees hereby notify the clerk that the district court has decided the motion on remand. *See* DE88. The district court granted Smith’s request to supplement the record, allowed Defendants to submit Raybon’s declaration, and found that “the new evidence does not change [the court’s] previous factual findings or conclusions of law.” DE88:4.

Respectfully submitted,

s/ Edmund G. LaCour Jr.
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed on January 24, 2024, using the CM/ECF Document Filing System, which will send notification of such filing to all noticed parties.

s/ Edmund G. LaCour Jr.
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